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Mr. Corbin R. Davis
Michigan Supreme Court Clerk
P. O. Box 30052
Lansing, MI 48909

Re: Response to Proposed MCR 6.502 Amendment

Dear Mr. Davis:

It has come to my attention that the Court is considering an amendment to MCR 6.502 that would, in effect, bar consideration of claims of actual innocence by convicted persons which would be supported by evidence which could have, "through the exercise of due diligence," been discovered within 1 year of the conviction, but was not presented to a court under the rule. While the concept of winnowing out frivolous appellate claims from valid ones is admirable, the method the amendment chooses is seriously flawed.

The proposed rule is:

> Time for Filing. Unless otherwise permitted by law, a 1-year period of limitation
> shall apply to a motion under this section. The limitation period shall run from the latest of:
> (1) the date on which the judgment of conviction becomes final;
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
> (3) the date on which the right asserted was initially recognized by the Michigan Supreme Court, the Michigan Legislature, or the United States Supreme Court, if that right has been newly recognized by one of those entities and made retroactively applicable to cases on collateral review; or
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

The section which is most troublesome to me is H (4).

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In 1997, the family of a person convicted of murder, Larry Pat Souter, came to me to seek representation for him. He had been convicted of Second Degree Murder in 1992 for a death which had occurred in 1979. I spent 2 years working on his case. With the family and the assistance of investigators who were former FBI agents, we found a substantial body of evidence to demonstrate that he was actually innocent, that is, had not been in any way responsible for the death of the young woman. We filed a 6.500 motion in the circuit court where he had been convicted. It was denied without argument by the parties. Appeals through the Michigan appellate system also were denied without briefing or argument.

In a Habeas Corpus petition in the US District Court, the federal magistrate judge agreed that we had shown probable actual innocence, though the district rejected that recommendation and denied the petition. The Sixth Circuit Court of Appeals granted a certificate of appealability, ordered briefing and argument. On January 18, 2005, that court reversed the decision of the district judge and remanded the matter for a hearing. See *Souter* v. *Jones*, 395 F3d 577 (2005).

When the decision of the Sixth Circuit was reported in the Grand Rapids Press, a woman read it and remembered that she had reported certain observations to the police investigating the death of the young woman in 1979. Those observations indicated to her that her own father had killed the victim. (She had made the report and was interviewed by the investigators so within days of the 1979 death.) The police did a desultory investigation, made reports, and stuck them in a file. It was clearly exculpatory evidence.

In 1992, with no further information than they had in 1979, the authorities charged Larry Pat Souter with the murder of the victim. The exculpatory evidence was withheld from the defense counsel at the trial. Other violations of due process were shown by our investigation of the 1992 conviction.

Under the proposed amendment to 6.502, the vindication of Larry Pat Souter would have been made immensely more difficult, if it would ever have happened.

Both for practical and legal reasons, putting a one year "statute of limitations" would be wrong, unjust and unnecessary.

First, to quote Michigan Supreme Court Justice Patricia Boyle, certainly not in any pro-defense camp of Michigan jurists:

> "...the most fundamental injustice is the conviction of an innocent person."

She further stated on the precise point the proposed amendment addresses:

> "If the petitioner in fact demonstrates that there is a significant possibility that he is innocent, the court may consider his claim without requiring the petitioner to demonstrate good cause for his failure to raise the issue in an earlier proceeding."

People v *Reed*, 449 Mich. 375, 379, 535 NW2d 496 (1995).

To restrict a person from raising evidence of actual innocence because of an artificial limit, made for the convenience of the court system and for a false sense of the necessity of "finality" is itself an injustice that is not acceptable by a civilized society. Actual innocence is not a technicality, not pettifogging. It is the essence of what our system of justice should be about.

Next, the practicality of defense of persons charged and convicted of crimes today is that they are often underrepresented. This is not an attack on lawyers and courts trying to deal with an overburdened system. It is a reality brought on by the very attempt to handle the massive numbers of potential crimes with finite judicial and attorney resources. Setting a time bar on the Post-Appellate relief rule, **when dealing with "actual innocence" cases,** runs the severe risk of cutting off really innocent people from justice for reasons better addressed in more targeted ways.

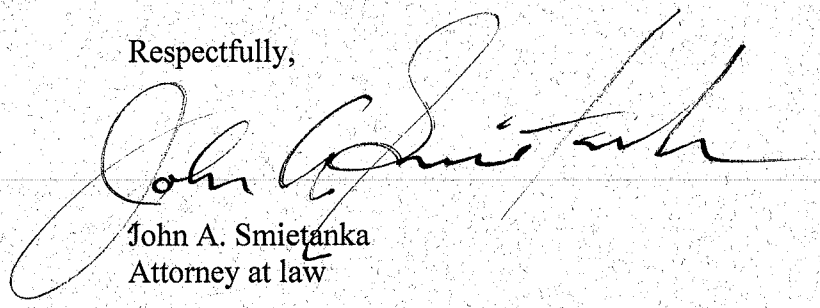
- If the fear is that without this amendment a flood of frivolous 6.500 appeals will be filed, an empirical study of the cases currently being filed might well show that "actual innocence" is one of the least used grounds.
- If the fear is that trial counsel will intentionally leave undiscovered the existence of truly exculpatory evidence in order to allow for an extra right to appeal in case of conviction, I would suggest two answers:
  - Such a trial counsel can be punished for a dishonest tactic like that; and
  - Again, going to the heart of the matter, allowing an actually innocent person to sit in prison for a crime he/she did not commit because we want to punish the attorney, is a judicial mortal sin.
- If the plan is that the amendment is a way of encouraging "due diligence," the reality is that there are already too few attorneys willing to take criminal appeals, especially those requiring real investigation, and far too few resources available to do it. A time limit for "actual innocence" cases will cause the otherwise willing counsel to slam the door when prisoners or their families come knocking, rather than take on the task of doing the investigation necessary, often for no or inadequate compensation, while the clock is ticking loudly.

Next, a phenomenon of the last 20 years is "cold case" investigations and prosecutions. The law allows prosecutors to work at (or put on the back burner) cases where the evidence needed to convict is just not there. They are working with statutes of limitation far beyond 1 year. In fact for capital cases, where "cold case" teams of prosecutors and investigators have been utilized to solve old crimes, there is no statute of limitations. And federal and state law only look to the generic "due process" standard to question the bona-fides of such a prosecution. As in Larry Pat Souter's case, the prosecution waited 12 years to charge the case, acquiring, in the finding of the state circuit judge, no new evidence than they had years before. Still the prosecution was excused by the trial judge from any penalty for that delay. The mutability of witnesses' memories, the vagaries of physical evidence maintenance and the defendants' resources all combine to set the stage for wrongful convictions. But the defense is limited to a one-year statute for evidence of actual innocence to be presented and considered.

The ultimate horror of this rule would be the convicted person, actually innocent of the crime for which she/he is imprisoned, sitting in a cell because of a lack of resources or an overloaded/ lazy/venal/incompetent defense counsel, or, perhaps the worst reason of all, because no attorney will take the case due to trying to balance their own caseload with the ominous tick-tock of the clock.

There must be other methods of easing the courts' burdens than the proposed amendment.

Respectfully,



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JAS:jmr